

## **CALIFORNIA FISH AND GAME COMMISSION NOTICE OF FINDINGS**

NOTICE IS HEREBY GIVEN that, pursuant to the provisions of Fish and Game Code Section 2074.2, the California Fish and Game Commission, at its February 3, 2005, meeting in San Diego, rejected the petition filed by the Center for Biological Diversity to list the tricolored blackbird (*Agelaius tricolor*) as an endangered species based on a finding that the petition did not provide sufficient information to indicate that the petitioned action may be warranted. At this meeting, the Commission also announced its intention to ratify its finding at its March 17, 2005, meeting in Oakland.

NOTICE IS ALSO GIVEN that, at its March 17, 2005, formal meeting in Oakland, the Commission adopted the following formal findings outlining the reasons for the rejection of the petition.

### **I**

#### **BACKGROUND**

On April 9, 2004, the Center for Biological Diversity, et al. submitted a petition to list the tricolored blackbird (tricolor) as an endangered species and requested that the Commission take emergency action pursuant to Section 2076.5 of the Fish and Game Code to emergency list the tricolor as an endangered species. The Commission, at its May 4, 2004, meeting in San Diego, considered and denied this request. The Commission's findings were:

1. There was insufficient information to indicate that there was any emergency posing a significant threat to the continued existence of the species;
2. There was insufficient evidence to suggest that an emergency regulation was necessary for the immediate conservation, preservation or protection of the tricolor; and
3. The Commission directed the Department to thoroughly review the petition to list the tricolor as an endangered species as required in sections 2072.3 and 2073.5 of the Fish and Game Code, and to report to the Commission if at any time during the review process it believes that emergency action is warranted.

### **II**

#### **STATUTORY REQUIREMENTS**

A species is endangered under California Endangered Species Act (CESA), Fish and Game Code Section 2050 et seq., if it "is in serious danger of becoming extinct throughout all, or a significant portion, of its range due to one or more causes, including loss of habitat, change in habitat, over exploitation, predation, competition, or disease." (Fish & G. Code, § 2062.) A species is threatened under CESA if it is "not presently threatened with extinction [but] is likely to become an endangered species in the foreseeable future in the absence of the special protection and management efforts required by [CESA]..." (Fish & G. Code, § 2067.) The responsibility for deciding whether a species should be listed as endangered or threatened rests with the Fish and Game Commission (Commission). (Fish & G. Code, § 2070.)

California law does not define what constitutes a "serious danger" to a species, nor does it describe what constitutes a "significant portion" of a species' range. The Commission makes

the determination as to whether a species currently faces a serious danger of extinction throughout a significant portion of its range, (or for a listing as threatened whether such a future threat is likely) on a case-by-case basis after evaluating and weighing all the biological and management information before it. This approach is consistent with the process followed by federal agencies in deciding whether to list species under the Federal Endangered Species Act, 16 U.S.C. § 1531 et seq.

Non-emergency listings involve a two-step process: first, the Commission "accepts" a petition to list the species, which immediately triggers regulatory protections for the species as a candidate for listing and also triggers a year-long study by the Department of Fish and Game (Department) of the species' status (Fish & G. Code, §§ 2074.2, 2074.6, and 2084); second, the Commission considers the Department's status report and information provided by other parties and makes a final decision to formally list the species as endangered or threatened (Fish & G. Code, § 2075.5).

To be accepted by the Commission, a petition to list a species under CESA must include sufficient scientific information that the listing may be warranted. (Fish & G. Code, § 2072.3, Cal. Code Regs., tit. 14, § 670.1, subds. (d) and (e).) The petition must also include information regarding the species' population trend, range, distribution, abundance and life history; factors affecting the species' ability to survive and reproduce; the degree and immediacy of the threat to the species; the impact of existing management efforts; suggestions for future management of the species; the availability and sources of information about the species; information about the kind of habitat necessary for survival of the species; and a detailed distribution map. (Fish & G. Code, § 2072.3, Cal. Code Regs., tit. 14, § 670.1, subd. (d)(1).) In deciding whether it has sufficient information to indicate the petitioned listing may be warranted, the Commission is required to consider the petition itself, the Department of Fish and Game's written evaluation report, and other comments received about the petitioned action. (Fish & G. Code, § 2074.2.)

The requisite standard of proof to be used by the Commission in deciding whether listing may be warranted (i.e. whether to accept or reject a petition) was described in *Natural Resources Defense Council v. Fish and Game Commission* (1994) 28 Cal. App.4<sup>th</sup> 1104. In the *NRDC* case, the court determined that "the section 2074.2 phrase 'petition provides sufficient information to indicate that the petitioned action may be warranted' means that amount of information, when considered in light of the Department's written report and the comments received, that would lead a reasonable person to conclude there is a substantial possibility the requested listing could occur..." (*NRDC*, supra, 28 Cal. App. 4<sup>th</sup> at page 1125.) This "substantial possibility" standard is more demanding than the low "reasonable possibility" or "fair argument" standard found in the California Environmental Quality Act, but is lower than the legal standard for a preliminary injunction, which would require the Commission to determine that a listing is "more likely than not" to occur. (*Ibid.*)

The *NRDC* court noted that this "substantial possibility" standard involves an exercise of the Commission's discretion and a weighing of evidence for and against listing, in contrast to the fair argument standard that examines evidence on only one side of the issue. (*NRDC*, supra, 28 Cal. App. 4<sup>th</sup> at page 1125.) As the Court concluded, the decision-making process involves:

...a taking of evidence for and against listing in a public quasi-adjudicatory setting, a weighing of that evidence, and a Commission discretion to determine essentially a question of fact based on that evidence. This process, in other words, contemplates a meaningful opportunity to present evidence contrary to the petition and a meaningful consideration of that evidence." (*Id.* at 1126.)

Therefore, in determining whether listing "may be warranted," the Commission must consider not only the petition and the report prepared on the petition by the Department, but other evidence introduced in the proceedings. The Commission must decide this question in light of the entire record.

### III REASON FOR FINDING

This statement of reasons for the finding sets forth an explanation of the basis for the Commission's finding and its rejection of the petition to list the tricolor as an endangered species. It is not a comprehensive review of all information considered by the Commission and for the most part does not address evidence that, while relevant to the proposed listing, was not at issue in the Commission's decision.

In order to accept this petition, the Commission is required to determine that it has information to persuade a reasonable person that there is a substantial possibility that the tricolor will be listed. As the decision in the NRDC case makes clear, the Commission must critically evaluate and weigh all evidence, and this process does not allow the Commission to resolve all uncertainties in favor of either the proponents or opponents of the listing. The Commission may deal with data gaps by drawing inferences based on available information or by relying on expert opinion that the Commission finds persuasive, but in the end the petition and other information presented to the Commission must affirmatively demonstrate the species meets the criteria for protection as a candidate species.

Fish and Game Code Section 2072.3 provides there are several factors to be considered in determining whether a petition should be accepted. The informational deficiencies and factors of Section 2072.3 most relevant to this finding are again:

- (1) Population trend;
- (2) Population abundance; and
- (3) The degree and immediacy of threat.

- 1. **Population Trend:**
- 2. **Population Abundance:**

In discussing population estimates, the petition cites Beedy and Hamilton's work for all historical and recent breeding accounts. The reports indicate that tricolor populations were declining from levels in the 1930's (1 million to 700,000 birds) and the 1970's (50 percent reduction but no numbers cited). It is interesting that Beedy and Hamilton estimated an annual average of 35,000-110,000 breeding adults during the 1980's. However, the petitioner qualifies this information by noting that these population estimates were not backed up by field surveys, so they are therefore "not considered adequate..."

The 1994, 1997 and 2000 surveys were all based upon the "3<sup>rd</sup> weekend in April" census approach to colony counting. From the information, it appears "additional fall season range-wide surveys" were conducted in 1994. The 1994 survey estimated that 60.5 percent of breeding individuals were found in the 10 largest colonies.

The above mentioned surveys provided population estimates of 369,359 in 1994 to 232,960 in 1997 to 162,508 in 2000. In the petitioner's rebuttal letter dated February 3, 2005, it states that "The exact number of birds, however, is not relevant because we do not know, and likely can never know, what number is necessary to maintain a stable population. What is important is that the censuses document a precipitous recent decline and that much of this decline can be explained by identified causes that are ongoing and not being addressed." (February 3 letter, bottom of page 2)

In its petition, the petitioner lists those causes as:

- Ongoing destruction of grain silage colonies
- Failure to protect highly productive nesting substrates such as Himalayan blackberry
- Permanent loss of nesting substrate due to increasing urbanization and shifts to vineyards and orchards
- Continued high levels of predation
- Spraying of agricultural contaminants

In testimony presented and in written comments, it was pointed out that the "declines" in the 1997 and 2000 surveys could be that "additional full season range-wide surveys" were not conducted; and therefore, gave lower numbers than in 1994 when a "fall season range-wide survey" was conducted. In addition, Hamilton (2003) states that "If we knew annual survivorship we could estimate the impact of losses of nestlings to agricultural harvesting. If annual survivorship is relatively high these reproductive failures may be relatively unimportant." Also, it's a scientific fact that species numbers are cyclic and fluctuate with environmental changes.

What was intriguing to the Commission was that the petition and the Department's evaluation report (which recommended acceptance of the petition) seemed to be at odds on this issue of population estimates. An important question which the petition must address is: "What is the best estimate of the current abundance and population status for the petitioned species?" The petitioners rely on survey data that has been gathered on population trends and abundance since the 1930's. The petitioners seem to place heavy weight on three field surveys conducted between 1994-2000 which seem to indicate a steady decline in the tricolor population.

On the other hand, the Department's evaluation report states that the field surveys relied on by the petitioners (1994, 1997 and 2000) "have little value in estimating population size." Based on this statement, the Department appears to be rejecting the petitioners data as failing the "sufficient scientific information" test and then it introduces its own indicator of the population status of the tricolor: the largest detected colony size.

Information provided to the Commission requests that the Commission reject the Department's indicator of the population status of tricolor as there is absolutely no previous scientific theory in the literature postulating that estimating the largest detected colony size is a legitimate, scientific method for estimating overall population status, that the Department seemed to have developed this theory with no references to any underlying scientific theory or fact and that the theory had not received even preliminary scientific vetting or peer review. The Commission agrees that this "new theory" does not meet the "sufficient scientific information" test.

Curiously, neither the petitioner (in its February 3, 2005, rebuttal letter) or the Department (in its Evaluation Report) utilized information from the 2004 survey. The Department indicated that the information was provided too late for its analysis, but it was reported to the Commission that the information was provided in early August, at least a month before the Department's evaluation report was submitted to the Commission. That information included data from Dr. William J. Hamilton III (one of the premier tricolor scientists) who had surveyed a large, successful nesting colony at Delevan National Wildlife Refuge. His detailed account of observation of a 136,000 tricolor colony that fledged over 97,000 young was the largest reported colony since the 1960's. This information would refute the Department's "theory" regarding the "largest detected colony size" as an indicator of the species' decline.

The petitioner, in its February 3, 2005, rebuttal letter, states that "While the 2004 survey was a good effort to identify the location and relative size of colonies, it is not a reliable or accurate estimate of population size, and in fact was not designed to determine population trend (reference to Department's evaluation report). In addition, final estimates are not available, and when they are available, numbers from this survey must necessarily be viewed with extreme caution....In sum, the methods and protocol with respect to reporting and analysis of the 2004 survey are highly suspect and the 2004 survey results cannot reliably be used for population estimations."

The Commission disagrees with the above statements as being misleading and an incomplete characterization of the 2004 survey results. While the 2004 survey did depart from the April surveys in 1994, 1997, and 2000, which were to locate all tricolor colonies, estimate their numbers, and determine nesting outcomes where possible, that numbered 2,000 or more birds in the past, count colonies found, document the location and size of new colonies, and document the condition of sites used historically, it did provide good information from Dr. Hamilton's personal surveys.<sup>1</sup> On one hand the petitioners utilizes Dr. Hamilton's data, but in this instance, they disregard it.

Green and Edson (2004) explained that "The express purpose of the 2004 survey was to visit historical Central Valley sites, so the difference with previous surveys is perhaps not surprising as survey effort was concentrated in a smaller area than in previous years. The numbers of active colonies was low compared to previous years (33 in 2004 versus 72 in 2000, for example), but many sites in southern California were not visited, and many small, historical colonies were not visited, thus perhaps accounting for some of the discrepancies. Small colonies make up for the bulk of all colonies every year. In 2000, for example, 50 of the 72 active colonies found during the survey had fewer than 2,000 birds each (Hamilton 2000)....We reiterate, that the results of this survey were not intended to be used to estimate the statewide or even valley-wide tricolored blackbird population. A more accurate estimate would require more surveyors covering more potential tricolored blackbird nesting habitat over more of the breeding season, or using new methods combining intensive area sampling and double-observer methods (Yee and Miller 2004). Although the results cannot support conclusions related to trend of the overall population, they do provide valuable information on the current status of many of the known colony sites in southern part of the Central Valley."<sup>2</sup>

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<sup>1</sup>Page 29, "The 2004 Tricolored Blackbird April Survey", Green & Edson, Central Valley Bird Club Bulletin, Spring/Summer 2004, Volume 7 – Nos. 2 & 3.

<sup>2</sup>Pages 29 & 30, "The 2004 Tricolored Blackbird April Survey", Green and Edson, Central Valley Bird Club

In addition, premier tricolored blackbird scientist, Dr. William J. Hamilton III, conducted a season-long survey and located all colonies reported to him by the Central Valley Bird Club observers. Dr. Hamilton indicated that some of the Central Valley Bird Clubs counts were modified based upon (1) his personal counts of the number of nests in a colony after the breeding season, (2) discussion with the observers who made observations during the survey, (3) more exact measurements of the areas occupied by colonies at some later date, and (4) inclusion of the largest number of birds present at any time during the season, estimates at the time of the survey notwithstanding.<sup>3</sup>

Dr. Hamilton also stated that "Active colonies settled in silage need to be protected, but the implication that the ongoing decline of tricolor populations is mostly due to harvesting of silage fields by dairy farmers (Center for Biological Diversity 2004) is not based upon a comprehensive analysis of existing data. Important conservation priorities of tricolors are not limited to protection of the silage field nesting colonies in the San Joaquin Valley."<sup>4</sup>

As noted earlier, during the 2004 survey, Dr. Hamilton observed the largest colony since the 1960's at Delevan National Wildlife Refuge of over 136,000 birds that fledged over 97,000 young. It was reported that more tricolors were observed during the restricted 2004 survey than in 1997 or 2000 surveys. This information provides credible evidence that the tricolors' population trend is not necessarily declining; and therefore, is not endangered throughout all or a significant portion of its range.

Fish and Game Code Section 2072.3 clearly states that the petition must provide information about species' abundance and population trend. This petition is clearly deficient in providing sufficient scientific information on both population trend and abundance.

**3. The degree and immediacy of threat:**

The problems caused by the current petition's lack of population abundance and trend information are compounded within the petition's discussion of purported threats to tricolor. Without a reliable estimate of population, no realistic assessment of the scope of the threat to the species is possible. The petition also fails to state clearly the effects of not listing tricolor. Most listings of other species by the Commission were clearly documented by utilizing population size to show dramatic and measurable declines in population caused by the lack of protections. Some listings of species looked to small population size initially to show the need for immediate protection of the species.

A primary threat claimed in this petition is tricolor nesting habitat destruction from harvesting dairy silage. Instead of demonstrating actual threats to the survival of tricolors, the petitioners provide general and vague statements that they say may have impacts to tricolor survival. There are no numbers, no facts and no actual demonstration of harm, much less a threat to the overall survival of the species. The petition only offers

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Bulletin, Spring/Summer 2004, Volume 7 – Nos. 2 & 3.

<sup>3</sup>Pages 32 & 33, "Management Implications of the 2004 Central Valley Tricolored Blackbird Survey", William J. Hamilton III, Central Valley Bird Club Bulletin, Spring/Summer 2004, Volume 7 – Nos. 2 & 3.

<sup>4</sup>Page 43, Ibid.

vague generalities about the scale of the threat to tricolors, with no indication of how the species would be impacted.

As noted earlier, Dr. Hamilton has stated that, "If we knew annual survivorship we could estimate the impact of losses of nestlings to agricultural harvesting. If annual survivorship is relatively high these reproductive failures may be relatively unimportant." The petitioners failed to generate any information to support their claims and provide any credible evidence of the effect of nest destruction on the species as a whole.

Fish and Game Code Section 2072.3 explicitly requires the presentation of sufficient credible information on the questions of degree and immediacy of threat and the impact of existing management efforts. Section 2072.3 provides that "Petitions shall include information regarding...the degree and immediacy of threat, the impact of existing management efforts..." The petition lacks sufficient information on the degree and immediacy of threat component of the statute under current conditions.

Tricolors are provided existing protection under the Migratory Bird Treaty Act and Sections 3503 and 3513 of the Fish and Game Code. In addition, a Tricolored Working Group was formed several years ago to develop and implement conservation measures beneficial to tricolors. Efforts of the cooperative working group and other possible collaborative efforts among state, federal, local and private parties have provided substantial benefits for the species and have the potential for additional future protections. The Commission, therefore, concludes that existing regulatory mechanisms further support the finding that there is not sufficient information to indicate that the petitioned action may be warranted.

#### IV FINAL DETERMINATION BY COMMISSION

The Commission has weighed all the scientific and general evidence in the petition, the Department's written report, and written and oral comments received from numerous members of the public, and, based upon that weighing of the evidence, the Commission has determined that, although there may be some reason for concern, the petition provides insufficient evidence to persuade the Commission that the petitioned action may be warranted (Fish and Game Code Section 2074.2). In making this determination the Commission finds that the petition does not provide sufficient information in the categories of population trend, abundance, and degree and immediacy of threat to find that the petitioned action may be warranted. In weighing the evidence, the Commission further finds that any threat to tricolored blackbirds in California is reduced by the existing statutory protections. The Commission also finds that the petition does not provide sufficient information range-wide regarding populations trends and abundance and immediacy of threat for the Commission to adequately assess the threat and conclude that there was a substantial possibility that the species will qualify for listing.

Fish and Game Commission

Dated: March 17, 2005

Robert R. Treanor  
Executive Director

